

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JOSE VELEZ,

12 Plaintiff,

13 v.

14 IL FORNAIO (AMERICA)
15 CORPORATION, DOES 1–100,

16 Defendants.
17
18
19

Case No.: 18-CV-1840 TWR (MDD)

**ORDER (1) GRANTING
PLAINTIFF’S MOTION FOR
VOLUNTARY DISMISSAL,
(2) DENYING DEFENDANT’S
MOTION FOR INVOLUNTARY
DISMISSAL, AND
(3) DISMISSING ACTION
WITHOUT PREJUDICE**

(ECF Nos. 73, 76)

20 Presently before the Court are the Motion to Dismiss for Failure to Prosecute FRCP
21 41(b) filed by Defendant Il Fornaiio (America) Corporation (“Il Fornaiio”) (“Def.’s Mot.,”
22 ECF No. 73) and Plaintiff Jose Velez’s Motion for Voluntary Dismissal (“Pl.’s Mot.,” ECF
23 No. 76) (with Defendant’s Motion, the “Motions”), as well as Il Fornaiio’s Response in
24 Opposition to (“Opp’n,” ECF No. 78) Plaintiff’s Motion. The Court concludes that the
25 Motions are appropriate for determination on the papers without oral argument pursuant to
26 Civil Local Rule 7.1(d)(1). Having carefully considered the Motions, the Parties’
27 arguments, and the law, the Court **GRANTS** Plaintiff’s Motion, **DENIES** Defendant’s
28 Motion, and **DISMISSES WITHOUT PREJUDICE** this action in its entirety.

BACKGROUND

1
2 Plaintiff filed this action on August 7, 2018, alleging causes of action for violations
3 of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 *et seq.*, and
4 Unruh Civil Rights Act (the “Unruh Act”), Cal. Civ. Code §§ 51 *et seq.*, against three
5 defendants, including Il Fornaio. (*See generally* ECF No. 1.) All three defendants filed
6 answers to Plaintiff’s original Complaint. (*See generally* ECF Nos. 3–5.)

7 On October 3, 2018, Plaintiff filed a First Amended Complaint, (*see generally* ECF
8 No. 7), which Defendant Tacos El Gordo de Tijuana B.C., Inc. answered, (*see generally*
9 ECF No. 9), but which Defendants Il Fornaio and Tartine, Inc. moved to dismiss pursuant
10 to Federal Rule of Civil Procedure 12(b)(6). (*See generally* ECF Nos. 10–13.) Following
11 settlement, Plaintiff voluntarily dismissed Defendant Tacos El Gordo on November 20,
12 2018. (*See generally* ECF Nos. 25–26.) On December 10, 2018, the Honorable Cathy Ann
13 Bencivengo granted Defendants Il Fornaio and Tartine’s motions to dismiss. (*See*
14 *generally* ECF No. 27.)

15 Plaintiff filed a Second Amended Complaint against Defendants Il Fornaio and
16 Tartine on December 17, 2018, (*see generally* ECF No. 28), which Defendants again
17 moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on January 11,
18 2019. (*See generally* ECF No. 29.) On February 22, 2019, Judge Bencivengo dismissed
19 with prejudice Plaintiff’s Second Amended Complaint pursuant to Federal Rules of Civil
20 Procedure 12(b)(1) and 12(b)(6) for lack of Article III and statutory standing. (*See*
21 *generally* ECF No. 32.)

22 Plaintiff appealed Judge Bencivengo’s dismissal on March 26, 2019. (*See generally*
23 ECF No. 43.) On June 11, 2020, the Ninth Circuit reversed and remanded, concluding that
24 Plaintiff had “sufficiently allege[d] Article III standing,” *Velez v. Il Fornaio (Am.) Corp.*,
25 808 Fed. App’x 581, 582 (9th Cir. 2020) (citing *Civil Rights Educ. & Enf’t Ctr. v. Hosp.*
26 *Props. Tr.*, 867 F.3d 1098, 1102 (9th Cir. 2017)), and that Plaintiff “also sufficiently [had]
27 allege[d] statutory standing under the ADA.” *Id.* (citing *Weaving v. City of Hillsboro*, 763
28 F.3d 1106, 1111 (9th Cir. 2014)).

1 On August 14, 2020, following remand from the Ninth Circuit, (*see generally* ECF
2 No. 56), Judge Bencivengo granted Plaintiff leave to file his operative Third Amended
3 Complaint, which asserts causes of action for violation of the ADA and Unruh Act against
4 Defendant Il Fornaio only. (*See generally* ECF Nos. 53–54.) Il Fornaio filed a motion to
5 dismiss for lack of standing on August 28, 2020, (*see generally* ECF No. 58), and this
6 action was transferred to the undersigned on September 23, 2020. (*See generally* ECF No.
7 63.) The undersigned denied Il Fornaio’s motion on March 5, 2021, concluding that it was
8 unable to resolve a factual dispute concerning Plaintiff’s standing because the issue was
9 substantially intertwined with the merits of Plaintiff’s claims. (*See generally* ECF No. 64.)

10 After the Court granted Plaintiff leave to file documents in this case electronically
11 on April 22, 2021, (*see* ECF No. 71), Plaintiff failed to appear at a telephonic status
12 conference before Magistrate Judge Mitchell D. Dembin on April 30, 2021. (*See* ECF No.
13 72.) Accordingly, Magistrate Judge Dembin permitted Il Fornaio to file a motion to
14 dismiss, (*see id.*); Defendant’s Motion followed on May 3, 2021. (*See generally* ECF No.
15 73.) The Court accepted Plaintiff’s Motion on discrepancy, (*see generally* ECF Nos. 75,
16 76), and issued a briefing schedule. (*See* ECF No. 77.) Il Fornaio timely opposed, (*see*
17 ECF No. 78), and Plaintiff declined to file a reply.

18 LEGAL STANDARD

19 Dismissal under Federal Rule of Civil Procedure 41 may be voluntary or
20 involuntary. Involuntary dismissal is appropriate “[i]f the plaintiff fails to prosecute or to
21 comply with these rules or a court order,” and generally “operates as an adjudication on
22 the merits.” Fed. R. Civ. P. 41(b). On the other hand, if the defendants have filed an
23 answer and do not stipulate to the dismissal, “an action may be dismissed at the plaintiff’s
24 request only by court order, on terms that the court considers proper.” Fed. R. Civ. Proc.
25 41(a)(2). “Unless the order states otherwise, a dismissal under this paragraph . . . is without
26 prejudice.” *Id.* “A motion for voluntary dismissal under Rule 41(a)(2) is addressed to the
27 district court’s sound discretion.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 96
28 (9th Cir. 1996) (citation omitted). Although Rule 42(a)(2) states that a silent order is

1 without prejudice, “[t]hat broad grant of discretion [in Rule 41(a)(2)] does not contain a
2 preference for one kind of dismissal or another.” *Hargis v. Foster*, 312 F.3d 404, 412 (9th
3 Cir. 2002).

4 “When ruling on a motion to dismiss without prejudice, the district court must
5 determine whether the defendant will suffer some plain legal prejudice as a result of the
6 dismissal.” *Westlands*, 100 F.3d at 96 (citations omitted); *see also Smith v. Lenches*, 263
7 F.3d 972, 975 (9th Cir. 2001) (“A district court should grant a motion for voluntary
8 dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain
9 legal prejudice as a result.”) (citations omitted); *Stevedoring Servs. of Am. v. Armilla Int’l*
10 *B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (“The purpose of the rule is to permit a plaintiff to
11 dismiss an action without prejudice so long as the defendant will not be prejudiced or
12 unfairly affected by dismissal.”). “[L]egal prejudice’ means ‘prejudice to some legal
13 interest, some legal claim, some legal argument.’” *Smith*, 263 F.3d at 976 (quoting
14 *Westlands*, 100 F.3d at 97). When determining whether legal prejudice exists, “the cases
15 focus on the rights and defenses available to a defendant in future litigation.” *Westlands*,
16 100 F.3d at 97 (citation omitted). “For example, in determining what will amount to legal
17 prejudice, courts have examined whether a dismissal without prejudice would result in the
18 loss of a federal forum, or the right to a jury trial, or a statute-of-limitations defense.” *Id.*
19 (citations omitted). “[U]ncertainty because a dispute remains unresolved’ or because ‘the
20 threat of future litigation . . . causes uncertainty’ does not result in plain legal prejudice.”
21 *Smith*, 263 F.3d at 976 (quoting *Westlands*, 100 F.3d at 96–97). “Also, plain legal prejudice
22 does not result merely because the defendant will be inconvenienced by having to defend
23 in another forum or where a plaintiff would gain a tactical advantage by that dismissal.”
24 *Id.* (citing *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982)).

25 ///

26 ///

27 ///

28 ///

1 ANALYSIS

2 Il Fornaio requests that the Court dismiss this action with prejudice for failure to
3 prosecute under Rule 42(b), (*see* Def.’s Mot. at 15¹), while Plaintiff requests voluntary
4 dismissal without prejudice pursuant to Rule 42(a)(2). (*See* Pl.’s Mot. at 1–2.) Il Fornaio
5 opposes Plaintiff’s Motion on the grounds that it will be prejudiced if it is not permitted to
6 file a motion for partial summary judgment so that it may ascertain “whether [Plaintiff] is
7 the man depicted in the video” that undermines his ADA claims. (*See* Opp’n at 8–9.)

8 The Court understands the frustration of Il Fornaio’s counsel, Ara Sahelian, who has
9 litigated a number of cases involving Plaintiff, (*see id.* at 6, 9–10), and has even been sued
10 by Plaintiff for alleged defamation. (*See id.* at 10.) Plaintiff, however, has judicially
11 admitted that he lacks Article III standing to pursue this action. (*See* Pl.’s Mot. at 1–2
12 (“Given the COVID-19 situation, Plaintiff has no intention of returning to the public
13 accommodation in question in the near future and has no intention of patronizing the public
14 accommodation(s) at this time.” (citing *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d
15 939, 950 (9th Cir. 2011))).) Because Plaintiff lacks Article III standing, the Court does not
16 have subject-matter jurisdiction and must dismiss this action. *See Chapman*, 631 F.3d at
17 955 (reversing district court’s grant of summary judgment because the ADA plaintiff did
18 not have standing (citing Fed. R. Civ. P. 12(b)(1); *United States v. Hays*, 515 U.S. 737, 747
19 (1995))); Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-
20 matter jurisdiction, the court must dismiss the action.”).

21 The question, therefore, is whether the dismissal should be with or without prejudice.
22 While Mr. Sahelian may be able to show that he and future defendants may be prejudiced
23 by the dismissal of this action and resultant inability to obtain confirmation that Plaintiff is
24 not be as disabled as he claims, (*see* Opp’n at 4–10), there is no indication that *Il Fornaio*
25 itself will suffer plain legal prejudice. Indeed, dismissal is to Il Fornaio’s benefit because
26 it will obtain dismissal without paying damages or a settlement to Plaintiff. In any event,
27

28 ¹ Pin citations to Il Fornaio’s filings refer to the CM/ECF pagination.


1 “the expense incurred in defending against a lawsuit does not amount to legal prejudice,”
2 *Westlands*, 100 F.3d at 97 (citing *Hamilton*, 679 F.2d at 146), and “‘uncertainty because a
3 dispute remains unresolved’ or because ‘the threat of future litigation . . . causes
4 uncertainty’ does not result in plain legal prejudice.” *Smith*, 263 F.3d at 976 (quoting
5 *Westlands*, 100 F.3d at 96–97). The Court therefore concludes that dismissal without
6 prejudice is warranted.

7 **CONCLUSION**

8 In light of the foregoing, the Court **GRANTS** Plaintiff’s Motion (ECF No. 76),
9 **DENIES** Defendant’s Motion (ECF No. 73), and **DISMISSES WITHOUT PREJUDICE**
10 this action in its entirety, with each Party to bear its own fees and costs.² Accordingly, the
11 Clerk of Court **SHALL CLOSE** the file.

12 **IT IS SO ORDERED.**

13
14 Dated: October 21, 2021

15 
16 _____
17 Honorable Todd W. Robinson
18 United States District Court
19
20
21
22
23

24 _____
25 ² Although a prevailing party under the ADA may recover its reasonable attorneys’ fees, expenses, and
26 costs, *see* 42 U.S.C. § 12205, conditioning a voluntary dismissal on payment of the defendants’ attorneys’
27 fees “should only be . . . for work which cannot be used in any future litigation of these
28 claims.” *Westlands*, 100 F.3d at 97 (citing *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993); *Davis v.*
USX Corp., 819 F.2d 1270, 1276 (4th Cir. 1987)). Because the Court has determined that dismissal
without prejudice is appropriate, the Court cannot say that Il Fornaio’s legal expenses cannot be used in
any future litigation of these claims. Accordingly, the Court is unable to award Il Fornaio its fees and
costs.